(6)

Supreme Court, U.S.
FILED
MAY 15 1997
OFFICE OF THE CLERK

No. 96-1400

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

DANIEL E. LUNGREN
Attorney General of the
State of California
RICHARD M. FRANK
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
JOSEPH C. RUSCONI*
Deputy Attorney General
*Counsel of Record
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-4142

Counsel for Petitioners

Of Counsel:
JACK RUMP
Chief Counsel
PETER PELKOFER
Senior Counsel
State Lands Commission
100 Howe Avenue
Suite 100 South
Sacramento, CA 95825-8202

11pp

TABLE OF CONTENTS

Page

Argument 1

Conclusion 7

TABLE OF AUTHORITIES

Cases

Cobb Coin Company, Inc. v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540 (S.D. Fla. 1982) 6

Florida Dept. of State v. *Treasure Salvors, Inc.*, 458 U.S. 668 (1982) 5

Florida Dept. of State v. *Treasure Salvors, Inc.*, 689 F.2d 1254 (5th Cir. 1982) 4

In re State of New York, No. 1, 256 U.S. 490 (1921) 2-4

Maritime Underwater Surveys, Inc. v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983) 4, 5

Marx v. *Government of Guam*, 866 F.2d 294 (9th Cir. 1989) 6

Provident Bank v. *Patterson*, 390 U.S. 102 (1968) 4

Puerto Rico Aqueduct and Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 2

Zych v. *Unidentified, Wrecked & Abandoned Vessel*, 755 F.Supp. 213 (N.D. Ill. 1991) 5-6

Zych v. *Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992) 4, 5

TABLE OF AUTHORITIES (cont'd)

Page

Constitution

United States Constitution,
Eleventh Amendment . . . . . passim

Federal Statutes

Abandoned Shipwreck Act of 1987, 102 Stat. 432,
43 U.S.C. §§ 2101–2106 . . . . . passim

Submerged Lands Act, 67 Stat. 29,
43 U.S.C. §§ 1301–1315 6

Miscellaneous

134 Congressional Record H1178–80
(March 28, 1988) 7

Supplemental Admiralty Rule C(1) 4

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-1400

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The State of California and the State Lands Commission (hereinafter sometimes jointly referred to as "the State" or "California") submit this brief in reply to the brief in opposition filed by respondent Deep Sea Research, Inc. ("DSR").

ARGUMENT

1. In recasting the Questions Presented, DSR has misstated the basis for California's motion to dismiss in the district court. Contrary to the statement in DSR's Question No. 1, the State's motion was not premised solely on the court's lack of jurisdiction in admiralty by virtue of the Abandoned Shipwreck Act of 1987, 102 Stat. 432, 43 U.S.C. §§ 2101–2106 ("ASA"). Apart from whether the court had jurisdiction in admiralty, the State asked for dismissal on the independent

ground that the suit was barred by the Eleventh Amendment. Intervenor-Appellants' Excerpt of Record ("ER") 79. It is thus not possible for DSR to reduce this case to a simple instance of a court determining its own jurisdiction. Once it is established that a State is being sued, refusal to immediately honor a State's threshold invocation of Eleventh Amendment immunity and insisting instead that it remain in the case to litigate any issue impermissibly subjects a State to "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). The district court's insistence here that the State establish the merits of its claim to the *Brother Jonathan* by a preponderance of the evidence was particularly misplaced.

2. A conflict exists among the circuits: the Seventh and First Circuits have ruled that the Eleventh Amendment prohibits a district court from probing the merits of a State's claim to a shipwreck; the Ninth and Sixth Circuits have ruled that it does not, and further, that a district court may insist that a State prove its claim by a preponderance of the evidence as a precondition to invoking the Eleventh Amendment. DSR attempts to avoid the conflict by arguing that the cases from the Seventh and First Circuits are distinguishable from this case, proffering three supposed distinctions.

First, DSR examines the language of its complaint and the district court's interlocutory orders, and points out that there is no specific mention of the State of California. It apparently concludes from this that its action is not against the State. The time is long past, however, for assertions that an action is not against a State unless the State is specifically named as a party of record. As this Court stated in an *in rem* admiralty case over 75 years ago, *In re State of New York, No. 1*, 256 U.S. 490, 500 (1921):

> "As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record . . . has long since been abandoned, and it is now established that the question is to be determined not only by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record . . . ."

The sole named party defendant to this action is the vessel itself, the *Brother Jonathan*. This is in keeping with the *in rem* character of the action as one brought against an item of property, rather than named persons, to establish rights "against all the world." *No* other defendants, governmental or otherwise, are named. The complaint alleges that the wreck is "lost or abandoned," ER 64; seeks "confirmation of title free and clear against all the world of any and all liens and encumbrances," ER 68, 72; and prays both for a declaration of DSR's "exclusive right of salvage and possession," ER 74, and for confirmation of its title "against all the world," ER 75. DSR knew that the wreck lay on the State's submerged lands and that the State claimed title, its predecessor corporation having previously applied to the State Lands Commission for a salvage permit. Accordingly, DSR gave express notice by mail to the State Lands Commission of the pendency of the action. At the time that the State's motion to dismiss was filed, and even months later when it was denied, the State was the sole person or entity that had asserted a claim. It was not until later, after the State had appealed, that the federal government, the only other claimant, asserted a claim to a portion of the cargo. The district court's interlocutory order deals only with possession and salvage rights, not ultimate title (which is deferred for resolution later in the case), but it confers upon DSR "sole and exclusive possession" of the *Brother Jonathan*, and enjoins "all competing salvors, would-be salvors, or divers . . . from interfering with DSR's efforts to recover artifacts from the *Brother Jonathan* [and] from conducting salvage operations or collecting artifacts" in a defined area. Pet.App. A62–A63. The State is not

excepted from the sweep of this order.

From "the essential nature and effect of the proceeding, as it appears from the entire record," it is clear that this action is against the State. Had DSR wanted to proceed *in personam* to establish title against named persons, exclusive of the State, it had that option; it need not have proceeded *in rem*. See Supplemental Admiralty Rule C(1). Having chosen to proceed *in rem*, however, DSR must live with the consequences of that choice in terms of Eleventh Amendment jurisprudence. Its belated assertion that its *in rem* action really does not have as its object adjudication of the State's title claims is the same type of contrived argument that was discredited in *In re State of New York, No. 1, supra.*

Second, DSR notes that, in *Zych* v. *Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), the action was dismissed on Eleventh Amendment grounds only as against the State, and that the entire action was not dismissed. It does not explain why this circumstance should in any way ameliorate the inter-circuit conflict that exists here. Whether an absent party is "indispensable" so that a lawsuit must be dismissed in the absence of that party can only be determined in the context of that particular litigation. *Provident Bank* v. *Patterson*, 390 U.S. 102, 118 (1968). Whether all or only a portion of the action is dismissed after a court has determined to respect a State's assertion of Eleventh Amendment immunity may involve the court in consideration of various alternative procedural courses of action, ranging from dismissal of the entire action, to allowing the action to proceed "*in rem*" against all the world less the State, to allowing it to proceed *in personam* against other claimants who may then be before the court. *Compare Florida Dept. of State* v. *Treasure Salvors, Inc.*, 689 F.2d 1254, 1256 (5th Cir. 1982), *and Zych, supra,* 960 F.2d at 670, *with Maritime Underwater Surveys, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 7, 8 (1st Cir. 1983). Whichever of these courses a court might choose, that choice has no bearing on its antecedent determination that the Eleventh Amendment was properly invoked.

Finally, DSR repeatedly characterizes California's claim to the *Brother Jonathan* as a "bald and completely unsubstantiated claim" in an apparent attempt to suggest that the claims of Illinois and Massachusetts in the Seventh and First Circuit cases, respectively, were qualitatively so much stronger that a different conclusion concerning application of the Eleventh Amendment was warranted in those cases. Of course, in both *Zych, supra,* and in *Maritime Underwater Surveys, supra,* the court refused to probe the strength of the claim; it was enough that a claim had been asserted. The comparative merits of those claims relative to that of California in this case are therefore irrelevant. In any event, in both those actions, the principal element of the claim was the presence of the shipwreck on State property—the same situation that exists here, and a fact that two present members of this Court, and presumably the plurality as well, would have found alone dispositive in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 668 (1982), had the wreck there lain on submerged lands owned by the State of Florida.[1] If anything, the Illinois claim was weaker than that of California here, because, as between two contending private parties in that case, the district court determined that an insurer had paid a claim not only on the vessel itself but on the whole of its cargo, and further, that the insurance company had not abandoned the wreck. *Zych, supra,* 960 F.2d at 667, 668; *Zych* v. *Unidentified, Wrecked*

---

1. "If it were not for [an earlier court decision determining that the shipwreck lay in international waters, seaward of state-owned submerged lands], it would be beyond cavil that Florida owned . . . the artifacts pursuant to its ownership of the submerged land on which the *Atocha* rested . . . ." 458 U.S. at 711 (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell).

& Abandoned Vessel, 755 F.Supp. 213, 215, 216 (N.D. Ill. 1991).[2]

3. DSR forgoes any attempt to defend the Ninth Circuit's brief statement in support of its conclusion that the ASA has preempted other sources of State title to abandoned shipwrecks. Instead, without support either in the text of the ASA or in its legislative history, DSR offers a substitute rationale, imputing to Congress an unspoken intent to sweep away other, independently grounded State title claims to abandoned shipwrecks. These other claims have historically been premised on the land title conferred upon the States by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301–1315, taken in conjunction with the law of finds or State statutory assertions of title, or both. As pointed out in the *amicus* brief of the

---

2. Nor did the State content itself with the presence of the wreck on State submerged lands as the sole factor supporting its claim. Concerning the abandonment issue, it adduced testimony from an historian that he had found no evidence that any salvage attempts had ever been made on the *Brother Jonathan* by its owners or insurers, ER 126, 127, 131–32, and that two-thirds of the cargo was uninsured, ER 130. An archaeologist testified for the State that, in his opinion, the shipwreck was eligible for inclusion on the National Register of Historic Places, ER 142–48, 151–52, and that the wreck was embedded in the ocean floor, ER 153–54. Concerning DSR's criticism of the State for not undertaking discovery or subpoenaing DSR's witnesses to testify, one must remember that California intervened in this action for the specific and limited purpose of filing a motion to dismiss on Eleventh Amendment grounds, backed by affidavits and legal argument. This was the procedure used by several other States in other shipwreck cases, and previously approved by the Ninth Circuit itself in *Marx* v. *Government of Guam*, 866 F.2d 294, 296 (9th Cir. 1989). It was not until the initial hearing in September 1994 that the district court made clear its intention to demand more of the State, at a hearing to be held a scant two and one-half weeks later. Moreover, had the State commenced discovery and used the subpoena power, it ran the risk of becoming so entangled in the litigation that it might, as a consequence, have been deemed to have waived its Eleventh Amendment immunity. *See Cobb Coin Company, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 554–555 (S.D. Fla. 1982).

National Trust for Historic Preservation, at 19, the intent of Congress was not to displace existing State claims to shipwrecks, but rather to strengthen the enforceability of those claims. See 134 Cong. Rec. H1178–80 (March 28, 1988). DSR's interpretation does not comport with the congressional purpose.

4. Finally, DSR's characterization of the Ninth Circuit's ruling on abandonment as fact-driven, and therefore not worthy of this Court's attention, is belied by a review of lower court's abandonment discussion. To the contrary, the result below is driven by the decision's errors of law: (a) that abandonment of the vessel and the bulk of its cargo cannot be recognized if to do so would prevent treatment of the wreck and its cargo as a unitary *res*; and (b) that failure to attempt recovery of a vessel for 130 years can be excused by the absence of recovery technology that has only recently been developed. These are legal determinations of broad impact that go to the heart of the ASA's effectiveness and that must be corrected if the congressional purpose is to be served.

CONCLUSION

For the reasons stated here and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
RICHARD M. FRANK
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
JOSEPH C. RUSCONI*
Deputy Attorney General
*Counsel of Record
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-4142

Counsel for Petitioners

Of Counsel:
JACK RUMP
Chief Counsel
PETER PELKOFER
Senior Counsel
State Lands Commission
100 Howe Avenue
Suite 100 South
Sacramento, CA 95825-8202

May 1997